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No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

vs.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Texas, Fourteenth District

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether this Court should dismiss the writ of certiorari as improvidently granted in light of the extreme paucity of the record?

2. Whether the Due Process Clause of the Fourteenth Amendment renders facially unconstitutional a state law prohibiting extramarital sexual activity, specifically same-sex sodomy?

3. Whether the Equal Protection Clause of the Fourteenth Amendment renders facially unconstitutional a state statute prohibiting same-sex sodomy?

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is a nonprofit public interest law firm and education organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have briefed and argued, or presented the views of amici curiae, in numerous cases before this Court on these issues.

The ACLJ is committed to the defense of marriage and the traditional family. This case poses a threat to both. First, none of the petitioners' arguments challenging the distinction in legal treatment of extramarital heterosexual acts and homosexual acts would not also be an argument against the distinction in legal treatment of marital heterosexual unions and homosexual unions. Thus, petitioners strike at the institution of marriage itself. Second, petitioners argue for substantive due process protection of extramarital sexual acts. To recognize extramarital sex acts as "fundamental rights" would jeopardize the wide array of state laws governing even consensual, adult sexual activity, further pushing this nation toward sexual libertinism. The Constitution, however, neither does nor ought to enshrine the Sexual Revolution.

The ACLJ is also committed to the rule of law and judicial restraint. In this case petitioners, in what may well be a contrived test case, request a sweeping, novel constitutional decision based upon the most sparse record conceivable. This Court, however, is not a forum for abstract debates on constitutional questions. The ACLJ urges this Court to dismiss the writ as improvidently granted and to decline to let itself be

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[1]No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

used, in this possibly artificial test case, for political purposes.

This brief is being filed with the consent of the parties.

SUMMARY OF ARGUMENT

1. This Court should dismiss the writ as improvidently granted. The minuscule record in this case establishes virtually nothing beyond the fact that petitioners committed anal same-sex sodomy. For all the record reflects, the sodomy could have been nonconsensual, or public, or paid for, or incestuous, or part of an anonymous "one-night stand" arranged through an online chat room. The record does not even indicate whether either participant could fairly be described as homosexual in orientation. This case is therefore unsuitable for the landmark adjudication petitioners seek. All that is properly before the Court is a purely facial challenge to the classification, and prohibition, of certain extramarital deviant sexual acts. There is not even a record upon which to make either an informed judgment about such acts (for due process purposes) or an informed comparison between the acts within and without the scope of the challenged Texas statute (for equal protection purposes).

2. This Court should affirm the judgment rejecting petitioners' claim of a fundamental right to engage in same-sex sodomy. This Court has never recognized a fundamental right to engage in extramarital acts of sexual gratification, much less a right to sexual gratification unconnected to marriage or procreation. To reach such a result in this case would require not only the overruling of Bowers v. Hardwick, 478 U.S. 186 (1986), but also the invalidation of fornication laws (as petitioners admit) and a host of other laws defining sex offenses. This Court has repeatedly cautioned against the expansion of substantive due process, and no such expansion is warranted here. This case presents only a facial challenge, and the Texas sodomy statute clearly may be constitutionally applied in a broad range of circumstances, e.g., to coercive acts, to prostitution, to

public acts of sodomy, etc. (For all the record shows, such circumstances may well have applied here.) Hence, petitioners' facial challenge must fail.

3. This Court should affirm the judgment rejecting petitioners' equal protection claim. This case has been litigated under the rational basis standard; hence, as this Court explained in Heller v. Doe, 509 U.S. 312, 319 (1993), it would be wholly improper and unfair to inject a new standard here. Moreover, because there is no fundamental right at issue and because the record does not even identify what supposed suspect or quasi-suspect class petitioners belong to, heightened scrutiny is in any event unjustified. Under rational scrutiny, the ban on same-sex sodomy clearly passes constitutional muster. There are at least three, independently adequate, rational bases for the statute. First, a ban on same-sex sodomy permissibly furthers public morality. Second, the extensively documented health risks of same-sex sodomy supply a strong public health rationale for the statute. Third, based upon the view of all nine Justices in Bowers, as well as this Court's other "privacy" decisions, a state could reasonably conclude that, to minimize the likelihood of constitutional attack and invalidity, a ban on sodomy needed to exclude heterosexual acts. Importantly, the distinction between heterosexual and homosexual unions is the hallmark of marriage law. To invalidate that distinction here would be tantamount to holding marriage unconstitutional.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE WRIT AS IMPROVIDENTLY GRANTED.

There is virtually no record in this case.

All the probable arrest affidavits show is that two adult males – a 55-year-old white male (John Lawrence) and a 31-year-old black male (Tyron Garner) were found by police officers in the act of anal sodomy inside the apartment where the

former resides. Pet. App. 129a, 141a. The record does not reflect whether the sodomy was coerced or consensual,[2] performed for pay or not,[3] displayed to members of the public (e.g., done in full view of others in the room or in front of an unobstructed picture window) or not,[4] incestuous or not,[5] part of a long-standing practice or simply a one-time anonymous tryst in response to an internet solicitation.[6] The record likewise gives no indication whether either petitioner could fairly be described as homosexual, bisexual, or heterosexual (or some other category) in orientation (assuming, for present purposes, that such categories have coherence and constitutional relevance).

Petitioners did allege, in their motion to quash, that the criminal charges here "rest[ed] solely on consensual, adult, private sexual relations," Pet. App. 118a, 131a, and that petitioners are "gay Texans," id. at 121a, 133a. But allegations

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[2]There is no indication whether the petitioners, or either of them, were even capable of consenting (as opposed to being intoxicated, mentally ill, or mentally disabled, for example). Petitioners concede that "consent is a critically important dividing line," Pet. Br. at 13. Yet there is no evidence of consent in the present record.

[3]The probable cause affidavits list no occupation for Lawrence and list "unemployed" for Garner. Pet. App. 129a, 141a.

[4]The police were responding to a reported weapons offense. Id. The person who made the (false) report thereby purported to know, in some detail, what was going on in the apartment.

[5]The record gives no information about the blood or legal relationship, if any, between the petitioners. Cf. Tex. Penal Code Ann. § 25.02 (prohibiting incest, including "deviate sexual intercourse," and covering inter alia half-siblings and half- or whole-blood uncles and nephews).

[6]The record gives no information about the relationship, if any, between petitioners.

are not evidence. Moreover, under Texas law, unsupported allegations in a motion to quash are inadequate. "The proponent of a motion to quash the indictment has the burden of proof and may offer proof of the allegations in the motion to quash." State v. Perez, 948 S.W.2d 362, 364 (Tex. Crim. App. 1997) (citing, inter alia, Wheat v. State, 537 S.W.2d 20 (Tex. Crim. App. 1976), and Worton v. State, 492 S.W.2d 519 (Tex. Crim. App. 1973)). Accord Wheat, 537 S.W.2d at 520 ("The defendant has the burden of proof on a motion to quash an indictment or complaint"). Here, as in Worton, "the motion to quash was not self-proving and the [defendant] offered no proof in support of his allegation." 492 S.W.2d at 520.

In short, the record is essentially devoid of any meaningful fact beyond the mere existence of a violation of the challenged statute. Yet from this tiny fulcrum, petitioners would leverage a landmark constitutional decision.

The writ should be dismissed as improvidently granted.[7]

First, the paucity of the record precludes all but a facial challenge to the statute under the Due Process Clause. Lawrence v. Texas, 41 S.W.2d 349, 350 (Tex. Ct. App. 2001) ("[T]he facts and circumstances of the offense are not in the record. . . . Thus, the narrow issue presented here is whether Section 21.06 is facially unconstitutional"). There can be no "as applied" review where the Court simply cannot tell how the statute was applied.

Second, the virtually complete absence of record information about the petitioners and their circumstances precludes any class-based challenge under the Equal Protection

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[7]This Court has dismissed writs even when four Justices continue to believe the case should be heard on the merits. E.g., New York v. Uplinger, 467 U.S. 246 (1984) (dismissing writ over dissent of Chief Justice Burger and Justices White, Rehnquist, and O'Connor); NAACP v. Overstreet, 384 U.S. 118 (1966) (dismissing writ over dissent of Chief Justice Warren and Justices Douglas, Brennan, and Fortas).

Clause, as, it is impossible to know in what class to situate the petitioners (other than the class of males over the age of eighteen). All that the record would permit would be a facial challenge to the classification of acts, not persons, affected by the statute.

Third, even aside from the sharp limitations an impoverished record imposes on the issues presented, a sparse record provides an exceedingly poor vehicle for "landmark" constitutional litigation. This Court is not empowered to issue advisory opinions about hypothetical scenarios. Preiser v. Newkirk, 422 U.S. 395, 401 (1975). And a full record can be a necessary predicate to informed, reasoned adjudication of important constitutional issues. E.g., Wisconsin v. Yoder, 406 U.S. 205 (1972).[8] Thus, while the record in this case suffices for affirmance or summary disposition upholding the judgment below, it does not at all lend itself to legal pathbreaking or to the announcement of new constitutional doctrines.

This Court should dismiss this writ as improvidently granted.

II. PETITIONERS' SUBSTANTIVE DUE PROCESS CHALLENGE FAILS.

This Court has never recognized a federal constitutional right to engage in extramarital sexual acts -- even the consensual, nonmercenary, private acts of adults, much less sexual acts that deviate from the normal sexual union of a man and a woman. Carey v. Population Servs. Int'l, 431 U.S. 678, 688 n.5 (1977) ("the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state

[8]Petitioners' repeated forays into material outside the record, e.g., Pet. Br. at 16-18 & nn.10-12, 33 & n.25, 42-48 & nn.30-32, 34-36, bypasses the crucible of trial litigation so essential to sorting the wheat from the chaff.

statutes regulating private consensual behavior among adults . . . and we do not purport to answer that question now") (citations, editing marks, and internal quotation marks omitted). Creation of such a novel right would require precisely the sort of ahistorical, atextual, freewheeling substantive due process adjudication which this Court has renounced for the past thirty years. See, e.g., Washington v. Glucksberg, 521 U.S. 702, 720-22 (1997); Reno v. Flores, 507 U.S. 292, 302-03 (1993); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992); Michael H. v. Gerald D., 491 U.S. 110, 121-23 (1989) (plurality); Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986). As Justice Stevens wrote for a unanimous Court,

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. . . . The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins, 503 U.S. at 125 (citation omitted).

Petitioners rely heavily upon this Court's abortion and birth control jurisprudence. E.g., Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). Casey, however, relied heavily upon stare decisis in declining to overrule in toto the line of cases beginning with Roe v. Wade, 410 U.S. 113 (1973). See Casey, 505 U.S. at 854-69. In the present case, existing precedent -- Bowers -- weighs against recognition of the proposed right; hence the stare decisis rationale of Casey, regardless of its merits,[9] gives no support to petitioners.

[9]Some scholars have questioned the legitimacy of relying upon stare decisis in the context of constitutional interpretation. See generally Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the

(continued...)

Moreover, the Roe/Carey/Casey line of cases focuses on "the decision whether or not to bear or beget a child," Carey, 431 U.S. at 685, not the selection of or indulgence in the sexual gratification of one's choice. Accord Casey, 505 U.S. at 852-53 (abortion and birth control precedents concern "the meaning of procreation" and "human responsibility and respect for it"). Compare Pet. Br. at 40 (conceding that "'deviate sexual intercourse' is unrelated to any interest in reproduction, for oral and anal sex are obviously not methods of reproduction for any couple").[10] As this Court emphasized in Carey, "we do not hold that [strict scrutiny applies to a state law] whenever it implicates sexual freedom, . . . or affects adult sexual relations," 431 U.S. at 688 n.5 (internal quotation marks and citations omitted).

This Court's case law, therefore, provides no warrant for enshrining the potentially boundless variety of forms of sexual gratification in the Due Process Clause of the Fourteenth Amendment. Compare Pet. Br. at 13 (urging declaration of constitutional right "whether and how to connect sexually").[11] To do so would be to intrude in a fractious, polarizing way in the

[9](...continued)
Precedential Effect of Roe and Casey? 109 Yale L.J. 1535, 1548 n.38 (2000) (sketching argument and collecting authorities); Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol'y 23, 27-28 (1994).

[10]A crucial unspoken premise of petitioners' argument is that the election of anal sodomy, as opposed to vaginal intercourse, is merely a matter of "preference," like selecting what wine to have with dinner (or perhaps, in a less trivial example, choosing whom to vote for in an election). This completely ignores human anatomy and biology. See Amicus Brief of Texas Physicians Resource Council.

[11]Petitioners concede that their due process argument would at a minimum require recognition of a fundamental constitutional right to fornication. Pet. Br. at 22 n.16.

ongoing political and social tug of war over competing worldviews regarding sexual norms. That is not the role of this Court.

The Court's prior ventures into constitutional policymaking have damaged the institutional integrity of this Court. The "painful[] . . . face-off," Bowers, 478 U.S. at 194, over Lochner v. New York, 198 U.S. 45 (1905), and its progeny, the raw national division over Roe v. Wade and its progeny, and the current degeneration of the judicial confirmation process into the politics of character assassination and ideological accusation, are three prominent consequences of this Court making itself a font, rather than an interpreter, of constitutional rights. Such institutionally deleterious consequences counsel strongly against setting in constitutional concrete, by judicial fiat, the latest proposed constitutional right, a right supposedly hidden for more than a century in the shadows of the Constitution.

Even if this Court were inclined to add noncommercial, consensual, private, adult, same-sex sodomy to the list of unenumerated fundamental constitutional rights, this case would not be the proper vehicle for such a declaration. The case at bar presents only a facial challenge to the Texas statute. Supra § I. Hence, this Court will sustain the law unless it would be unconstitutional in all of its applications. United States v. Salerno, 481 U.S. 739, 745 (1987);[12] Reno v. Flores, 507 U.S. at

[12]This case does not involve the First Amendment. Hence, the overbreadth exception to Salerno does not apply. Id. at 745. Even if the overbreadth doctrine were theoretically applicable, there is simply no record in this case by which to hazard a guess about the relative scope of various permissible and impermissible applications of the statute. Hence, there is no basis for a finding of substantial overbreadth. See Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate
(continued...)

301 ("To prevail in such a facial challenge, [petitioners] must establish that no set of circumstances exists under which the [statute] would be valid") (emphasis added; internal quotation marks and citation omitted). The statute at issue here undisputedly has many constitutional applications -- e.g., to coercive sodomy, to sodomy prostitution, to sodomy of minors and others legally incapable of consenting, to public sodomy, etc. See Pet. Br. at 6, 22 n.16, 39-40 (conceding validity of prohibiting such conduct). Hence, petitioners' substantive due process claim must fail.

III. PETITIONERS' EQUAL PROTECTION CHALLENGE FAILS.

Petitioners' equal protection challenge to the Texas sodomy statute is tantamount to a challenge to the constitutionality of limiting marriage to a heterosexual couple. For the reasons set forth below, this challenge must fail.

A. There is No Fundamental Right at Issue.

There is no fundamental constitutional right to sodomy, much less same-sex sodomy. Supra § II. Hence, the classification at issue impinges upon no fundamental right that would warrant heightened scrutiny.

B. There is No Suspect Class at Issue.

Nor does any concern for "suspect classes" warrant heightened scrutiny here.

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[12](...continued)
sweep") (emphasis added).

1. The question is not properly presented.

Petitioners have not properly presented any claim to suspect class status:

> Even if [petitioners] were correct that heightened scrutiny applies, it would be inappropriate for us to apply that standard here. Both parties have been litigating this case for years on the theory of rational-basis review, which . . . does not require the State to place any evidence in the record, let alone the extensive evidentiary showing that would be required . . . to survive heightened scrutiny. It would be imprudent and unfair to inject a new standard at this stage in the litigation.

Heller v. Doe, 509 U.S. 312, 319 (1993). Hence, in the present case, as in Heller, the rational basis standard must govern.

2. The record does not support a challenge based on class status.

The extremely sparse record in this case, as noted earlier, supra § I, provides almost no information about petitioners or their relationship to each other. It is therefore impossible to situate petitioners in any supposed class -- e.g., homosexual persons, homosexuals involved in a long-term, committed relationship, etc. -- for purposes of standing to raise a challenge under the Equal Protection Clause. A fortiori, this Court cannot conduct any comparison of classes for purposes of equal protection analysis on the merits. Petitioners, for example, cannot claim discrimination against the class of those with a homosexual orientation, as the record does not indicate whether petitioners fall into that class.[13]

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[13]It does not logically follow from the mere commission of an act of same-sex anal sodomy that petitioners are homosexual in orientation, any more
(continued...)

C. The Only Classification at Issue is the Classification of the Conduct, Not the Persons Involved.

In light of the foregoing, the only classification at issue, for equal protection purposes, is the classification of the act of same-sex sodomy (i.e., sodomy between people of the same sex, not necessarily sodomy between homosexuals). As noted above, no classification of individual persons is involved. Compare Romer v. Evans, 517 U.S. 620, 633 (1996) (challenged law "identifies persons by a single trait") (emphasis added).

Petitioners repeatedly blur the distinction between "act" and "actor." It is vital to recall, therefore, that the challenged Texas statute bars all persons, regardless of sexual orientation or preference, from engaging in same-sex sodomy. See Vacco v. Quill, 521 U.S. 793, 800 (1997) (noting that challenged statute permits no one to engage in the forbidden act, but state allows everyone to engage in an arguably comparable act; thus, statute does not "treat anyone differently from anyone else or draw any distinctions between persons"). To imply, as petitioners do, that only homosexual persons are affected, is misleading and inaccurate. While it may be true that those who particularly desire to engage in the prohibited acts are more likely to regard the law as an obstacle (though the record does not speak to this), the same holds true for countless laws restricting human behavior. Id. ("Many laws affect certain groups unevenly, even though the law itself treats them no differently . . .") (editing marks and citation omitted; emphasis added). Motorcycle aficionados are presumably more likely affected by helmet laws than those who never or only occasionally ride a motorcycle.

[13](...continued)
than it would follow from another person's act of heterosexual intercourse -- or even entry into marriage -- that the person is necessarily heterosexual. Petitioners concede as much. Pet. Br. at 33 & n.25.

Drinkers are presumably more likely affected by liquor laws than teetotalers. Night owls are presumably more likely affected by curfew laws than early birds. But if the mere fact that some people have a greater or more regular desire to engage in the prohibited act than others were sufficient to raise an equal protection issue, then virtually every law would be subject to such a challenge.

Petitioners try to extract from the statute's treatment of couples -- i.e., the participants in the act viewed as an ensemble -- a sex-based classification. But the differential treatment of same-sex and different-sex couples is the hallmark of marriage, and thus no more entails an invidious sex-based class here than do marriage laws nationwide. Petitioners surely disagree with the proposition that limiting marriage to one man and one woman is constitutional -- to concede otherwise is to concede the validity of the very distinction they challenge. But this simply highlights the radical nature of petitioners' novel constitutional theory. Unless this Court is prepared to announce the unconstitutionality of marriage, petitioners' sex-based discrimination argument must fail.[14]

[14]Petitioners' argument would also call into question laws that restrict only heterosexual acts, such as California's incest statute prohibiting unions of uncle and niece, or of aunt and nephew, but not of uncle and nephew, or of aunt and niece. See Cal. Penal Code § 285 (West 1999) (tying incest prohibition to relationships too close to marry); Cal. Family Code § 2200 (West 1994) (incestuous bond would include uncle and niece or aunt and nephew). See also Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) (rejecting Equal Protection Clause challenge to statutory rape law limited to male perpetrators).

D. The Texas Sodomy Statute Easily Passes Rational Basis Scrutiny.

1. The standard

"If a legislative classification or distinction 'neither burdens a fundamental right nor targets a suspect class, we will uphold it so long as it bears a rational relation to some legitimate end.'" Vacco v. Quill, 521 U.S. at 799 (quoting Romer v. Evans, 517 U.S. at 631) (brackets omitted). Such "rational-basis review" recognizes that there is no '"license for courts to judge the wisdom, fairness, or logic of legislative choices.'" Heller, 509 U.S. at 319 (quoting FCC v. Beach Communications, 508 U.S. 307, 313 (1993)). Accord City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) ("When social . . . legislation is at issue, the Equal Protection Clause allows states wide latitude"). Thus,

> a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. . . . Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. . . . Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. . . . Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. . . .
>
> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. . . .

> A statute is presumed constitutional, . . . and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, . . . whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.

Heller, 509 U.S. at 319-21 (editing marks and citations omitted). "This standard of review is a paradigm of judicial restraint." FCC v. Beach Communications, 508 U.S. at 314.

2. Disposing of petitioners' flawed arguments

The Texas sodomy statute easily satisfies this deferential standard of review. In reaching this conclusion, several key points must be born in mind.

First, the heart of petitioners' equal protection argument is the decision of Texas to ban acts of same-sex sodomy but not acts of male/female sodomy.[15] As noted above, this is precisely the distinction between (lawful) heterosexual marriage and (unlawful) homosexual union. To embrace petitioners' argument is therefore to overthrow the legal institution of marriage as exclusively a union between one man and one woman. This implication alone illustrates the unprecedented, revolutionary, and deeply flawed nature of petitioners' argument.

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[15] Of course, the decriminalization of male/female sodomy, like the decriminalization of suicide, is not at all the same as affirmative approval or encouragement.

Second, state legislation in matters sexual draws distinctions all the time between "the same act" in only slightly different contexts. Heterosexual intercourse, conducted in an otherwise indistinguishable manner between the same persons, will (depending on state law) be lawful or unlawful depending on, for example: whether it is done the day before or the day after the birthday of one of the participants (age of consent laws);[16] the age difference between the participants (statutory rape laws);[17] the exchange of payment (prostitution laws);[18] the marital status of the participants (fornication and adultery laws);[19] the blood or legal relationship between the participants (incest laws);[20] the

[16]E.g., Cal. Penal Code § 261.5 (West Supp. 2003) (unlawful intercourse with minor under 18); Fla. Sta. Ann. § 800.04(5) (West Supp. 2003) (lewd or lascivious molestation of minor under 16); 720 Ill. Com. Stat. Ann. 5/12-14.1, 5/12-14(b), 5/12-15(b), (c), 5/12-16(c), (d) (West 2002) (tying offense level to age of victim).

[17]E.g., Cal. Penal Code § 261.5 (West Supp. 2003); Fla. Stat. Ann. § 794.05 (West 2000); id. § 800.04(5) (West Supp. 2003); 720 Ill. Comp. Stat. Ann. 5/12-14.1, 5/12-14(b), 5/12-15(b), (c), 5/12-16(c), (d) (West 2002).

[18]E.g., Fla. Stat. Ann § 796.07(e), (i) (West 2000); 720 Ill. Comp. Stat. Ann. 5/11-14, 5/11-18 (West 2002); N.Y. Penal Law §§ 230.00, 230.02 (McKinney 2000).

[19]E.g., Fla. Stat. Ann. §§ 798.01 (adultery), 798.02 (fornication) (West 2000); 720 Ill. Comp. Stat. Ann 5/11-7 (adultery), 5/11-8 (fornication) (West 2002); N.Y. Penal Law § 255.17 (McKinney 2000) (adultery).

[20]E.g., Cal. Penal Code § 285 (West 1999); Fla. Stat. Ann. § 826.04 (West 2000); 720 Ill. Comp. Stat. Ann. 5/11-11 (West 2002); N.Y. Penal Law § 255.25 (McKinney 2000).

presence of onlookers (public indecency laws);[21] and, the presence of media (obscenity laws).[22] This is true, moreover, not just for the consummation of normal heterosexual intercourse but also for a range of other sexual acts, such as the exposure of one's private parts and a host of deviant practices.[23] Thus, petitioners' protestation that same-sex sodomy and opposite-sex sodomy are "the same act," even if accepted for purposes of argument,[24] does not distinguish a host of other laws governing sexual acts. In short, laws governing sexual acts commonly draw debatable and arbitrary lines in many ways, lines that vary from state to state and even from year to year within a state (as statutes are amended).

Third, petitioners' invocation of various collateral consequences of the challenged prohibition is an inappropriate diversionary tactic. Petitioners have raised no claim under the

[21]E.g., Cal. Penal Code § 311.6 (West 1999) ("obscene live conduct" before audience); Fla. Stat. Ann. § 847.011(4) (West 2000) (obscene show or performance); 720 Ill. Comp. Stat. Ann. 5/11-20 (West 2002) (participation in obscene performance); N.Y. Penal Law § 235.05 (McKinney 2000) (same).

[22]E.g., Fla. Stat. Ann. § 847.011(1)(a) (West 2000) (posing for obscene literature).

[23]E.g., Cal. Penal Code § 314 (West 1999) (indecent exposure); Fla. Stat. Ann. §§ 800.03 (same), 872.06 (necrophilia) (West 2000); 720 Ill. Comp. Stat. Ann. 5/11-9 (West 2002) (public indecency); N.Y. Penal Law §§ 245 (public lewdness), 245.01 (indecent exposure) (McKinney 2000). Cf. 720 Ill. Comp. Stat. Ann. 5/12-16.2 (West 2002) (crime of "intimate contact," by person infected with HIV, absent informed consent of partner).

[24]It is far from obvious, however, that same-sex sexual acts are "the same" as opposite-sex acts, except in the most reductionist manner. Indeed, this contention seems of a piece with the claim that same-sex "marriage" is the same as heterosexual marriage.

Fourth or Eighth Amendments. Hence, the present challenge must be evaluated on the assumption that the enforcement measures taken, and the punishment meted out, are constitutionally unobjectionable. Those persons, if any, who find themselves disabled by the treatment of sodomy as a crime, or as a crime of moral turpitude, are free to challenge such disabilities directly. But the constitutionality of a prohibition cannot ebb and flow with the independent existence of separate laws imposing derivative consequences, any more than a state could render unconstitutional its laws against race discrimination by attaching a punishment of drawing and quartering the offender. Whether the sentence or other secondary consequences of an offense are themselves constitutional is a separate issue not presented here.

3. Rational basis for the distinction

"[W]e never require a legislature to articulate its reasons for enacting a statute[; hence,] it is entirely irrelevant whether the conceived reasons for the challenged distinction actually motivated the legislature." FCC v. Beach Communications, 508 U.S. at 315. Here, there are at least three conceivable rational bases for the prohibition on same-sex sodomy. Each is independently sufficient to sustain the challenged statute.

a. Furthering morality

Respondent urges, and the court below accepted, the proposition that a concern for morality suffices to support the distinction between forbidding acts of same-sex sodomy and not forbidding acts of opposite-sex sodomy. Ample support exists for this rationale,[25] not just in Bowers, but in the plethora of

[25]This is not to concede that deviant heterosexual sex acts are somehow (continued...)

morally based laws found in this country (e.g., bans on race discrimination, obscenity, corruption of minors, fraud, ethical breaches in the legal profession, and so forth). Petitioners' equation of morality with mere "dislike" would casually abandon the whole notion of right and wrong, thus undercutting the very premises of petitioners' own claim to fairness.[26] Moreover, opposition to an act is not the same as opposition to the actor. Bray v. Alexandria Women's Health Center, 506 U.S. 263, 270 (1993). Were the contrary true, a law like the Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 249, would be unconstitutional on grounds of animus toward pro-life persons.

b. Protecting public health

Anal sodomy is an abusive act, i.e., a misuse of the organs involved.[27] Not surprisingly, therefore, sodomy has adverse

[25](...continued)
moral simply because they are heterosexual. A state is not required, however, to be comprehensive in its response to a problem. "The legislature may select one phase of one field and apply a remedy there, neglecting the others." Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (quoted with approval in FCC v Beach Communications, 508 U.S. at 316).

[26]Under petitioners' rationale, hate crimes laws would be unconstitutional because they distinguish the same act based on "negative attitudes toward a group," Pet. Br. at 37, namely, the group of those harboring certain disfavored prejudices.

[27]See supra note 10. Abuse is no less abuse when the participants consent, as in autoerotic asphyxia, sadism and masochism, and various sexual bondage practices. Furthermore, consent to abuse is no protection against physical harm. For example, the bruises of a woman who agrees, for money, to be battered in a pornographic film, are no less real than the bruises of (continued...)

health consequences. See Amicus Brief of Texas Physicians Resource Council (documenting adverse health risks associated with practice of same-sex sexual acts). These consequences -- notably HIV/AIDS, but also a host of other diseases -- appear most heavily associated with same-sex sodomy. Id.[28] Therefore, it is certainly rational for a legislature to target the acts that give rise to the worst of the problem. Williamson v. Lee Optical, 348 U.S. at 489 (legislature may limit its response to "the phase of the problem which seems most acute") (quoted approvingly in FCC v. Beach Communications, 508 U.S. at 316).

c. Avoiding constitutional doubts

A state also has an obviously legitimate interest in tailoring its legislation to minimize the prospects of a successful constitutional attack. Texas had ample reason to believe that a same-sex sodomy ban was less vulnerable constitutionally than a blanket sodomy ban.

The Bowers Court was, of course, sharply divided on the merits of a ban on homosexual sodomy. But, a lopsided majority of the Court declined to give any assurance that a ban on heterosexual sodomy would pass constitutional muster. The majority expressly reserved the issue, 478 U.S. at 188 n.2 ("We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy"), and the dissenters expressly

[27](...continued)
anyone else.

[28]Whether this association results from a necessarily greater frequency of the act relative to normal intercourse when the participants are anatomically incapable of normal intercourse, or because the act is for biological reasons inherently more harmful when engaged in by members of the same sex, or for some other reason, is irrelevant. The rational basis for the statute rests upon targeting the consequence of the act by targeting the subset of acts most closely associated with the harm.

impugned the constitutionality of a ban on heterosexual sodomy, id. at 218-19 & n.10 (Stevens, J., joined by Brennan & Marshall, JJ.);[29] see also id. at 200-01 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ.). A state could rationally conclude from the views of both majority and dissent in Bowers that the constitutionally safer course would be to ban only same-sex sodomy.[30] This prudential assessment, while not adequate to pass heightened scrutiny, does suffice as a rational basis for the distinction.

CONCLUSION

This Court should dismiss the writ as improvidently granted. In the alternative, this Court should affirm the judgment of the Court of Appeals of Texas.

[29]The quoted portion of the dissent by Justice Stevens mentions married couples; however, this Court's decision in Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972), makes clear that the Bowers dissenters would not so limit the scope of a constitutional right to sodomy.

[30]To the extent that cases like Eisenstadt and Carey hint at, without actually holding, the existence of a broad constitutional right of sexual liberty, a state would have that much more of an incentive to avoid testing the constitutional line for private, consensual, heterosexual acts -- the presumed heartland of any such liberty.

Respectfully submitted,

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